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Dr. Dovilė Sagatienė

Preface

Although Baltic states are the example of successful transition from communist to democratic rule and integration in the European community, Estonia, Latvia and Lithuania are still dealing with the legacy of Soviet legal past. The confrontation between former Soviet officials and local resisters reaches national and international courts, “socialist legal thinking” is vivid in both civil and criminal cases, not to mention persisting practice of legal nihilism. In other former communist ruled states Moldova, Georgia, and Western Ukraine the situation is even more problematic as these countries lack strong historical connections with Europe and are struggling in establishing the rule of law.

Democratization of post-Soviet societies is one of the main conditions of stable Europe and the major goal of the former communist states as they cannot be successful without objective reevaluation of the past. Recent Russia’s politics also suggest explore the history of former Soviet occupied territories in order to impede misinformation about the real situation there. However, legal historians who could contribute substantially in implementing these tasks remain silent. They are backed not only by uncertain political and economical circumstances, but also by the lack of experience to analyze Soviet law from democratic perspective. During the last century Western experts developed various interpretations of Soviet law, which could serve for the researches of Soviet legal past in the new legal spaces. The problem is that diverse academic approaches in the West towards Soviet law were influenced by different political, social and personal factors, therefore they cannot be automatically applied to analyze Soviet legal heritage in young democracies with their own specific experience.

This article prepared at Max Planck Institute for European Legal History in Frankfurt (Germany) provides a compass for academics to orientate in the sea of various interpretations, which influences the perception of Soviet-Russian law even nowadays. The given account should prevent scholars from confusing different attitudes towards Soviet-Russian law and misunderstanding them, in other words, from getting into the net of legal framing.

Methodology

The aim of the article is to reveal interpretations of Soviet law, formed throughout the history by leading experts of Soviet law in the West (United States and Western Europe). The focus is on legal scholars as they are the most qualified to evaluate Soviet law. The experts are selected using two main factors: the long lasting activity and the large scale of productivity in the field. Some most read single authors are mentioned too. Till the 1990s Soviet law was investigated as an active law, but those scholars (mostly specialists of comparative law) who wanted to explain the origin of Soviet law using historical method, i.e. searching its background in the Imperial Russia or in previous ages, should be considered as the first Soviet legal historians.

The subject of the essay is interpretations of Soviet law in English literature during the last century. The hypothesis of the analysis states that different Western interpretations of Soviet law – negative, positive, and neutral – were formed by various political, social and personal factors. The object of the survey is books about Soviet law published in English literature from 1917 till 2015. Western scholars concentrated on the most controversial problems of Soviet criminal law and judiciary and the works on these issues have the biggest impact in understanding Soviet law in the West. Important contributions in other areas of Soviet law will be also presented. Following the presumption that future Soviet legal scholars will start their investigations from reading literature in English, because a) this language is the most popular foreign language in former Soviet occupied countries, b) the literature about Soviet law in English is of best analytical quality at the moment and c) has the biggest audience, the literature in other languages is not considered in this article.

General Soviet history and Soviet legal history

*To base policy on ignorance and illusion is very dangerous.
Policy should be based on knowledge and understanding.*
Averell Harriman

A lot of ink has been spilled on the various interpretations of general Soviet history in the past century. Historical views towards Soviet reality varies from totalitarian (1950s), to revisionist (1970s) and post-revisionist (1990s)¹. The so-called “totalitarian” school of historiography mostly focuses on the state, the party and the leaders of USSR and wants to demonstrate

¹ There still is a controversy on the term “totalitarian,” which was presented by Hannah Arendt (1906-1975) and Zbigniew Brezinski (b. 1928) as the widespread use of the term in Cold War political rhetoric devalued it and, in the eyes of later revisionist scholars, discredited it entirely (LITVIN, KEEP, 2005, 97). Alternative terms are “political,” “orthodox,” “traditionalist,” “intentionalist.”

that it was a system where the leadership exercised totalitarian control over an unwilling population. The scholars of this school see Stalin and his cronies as the key decision-makers who bore a heavy moral responsibility for crimes they either deliberately willed or had failed to check in good time². The emergence of a new generation of historians in the 1970s and 1980s who were not so anti-Soviet, led to this view being challenged, but the trend still remains vital in the upcoming historical works about Soviet history. Revisionists took a more positive attitude and gave different assessment of Stalinism. American historian John A. Getty (b. 1950) is considered as the author of the bible of revisionism and his book became a subject of keen controversy as he argued for a dispassionate approach to Stalinist repression and focused attention on input from below rather than the will of the leader(s) – an approach resembling that of the “functionalists” (“circumstantialists”) among historians of the Third Reich (Getty, 1985)³. They explained that the excesses that occurred during the Great Purge were in large part due to misinterpretation of commands from above by ignorant or over-zealous careerists. During the Cold War “totalitarians” called the revisionists “whitewashers” and “fellow-travelers” who were “soft on communism,” and revisionists called the totalitarians “cold warriors,” whose work was distorted by the imposition of a political agenda (Fitzpatrick, 2007, 81).

In the 1990s revisionists were challenged themselves by “post-revisionists” who were not interested in the discussion about who is to blame for crimes of Stalinism (political system or Stalin’s personality features) anymore. In the post-revisionist stream equally significant research objects are both an ideology and its expression in everyday life⁴. Post-revisionists criticize the totalitarian and revisionist history approach, which argue that USSR citizens could have imagined unbundled self-perception, which was not influenced by the time and space. For this reason post-revisionists started to look to the public mentality and the psychological culture of the Soviet period. The double thinking in USSR is one of the main topics in this area⁵.

As it will be shown further in this survey, Western scholarship on Soviet law in principal reflects “totalitarian,” revisionist and post-revisionist views towards Soviet reality, but the domain of Soviet law or “legal Kremlinology” (Newton, 2015, 13) is still relatively understudied.

² Among the most famous authors an American political scientist Merle Fainsod (1907-1972), German-born American political theorist Hannah Arendt, Polish-American political scientist Zbigniew Brezinski as well as Polish-American academic Richard Pipes (b. 1923) and British-American historian Robert Conquest (1917-2015) can be mentioned.

³ Other revisionists are: American historian and political scientist Robert Charles Tucker (1918-2010), American scholar of Russian studies Stephen Frand Cohen (b. 1938), Lithuanian origin Moshe Lewin (1921-2010), Australian-American historian Sheila Fitzpatrick (b. 1941), etc.

⁴ American historian Peter Holquist (b. 1964), European scholar Jochen Hellbeck (b. 1966), etc.

⁵ Some authors identifies only the first two views (ENTEEN, 2002, 357-363; LITVIN, KEEP, 2005, 91). There are arguments that appellation to post-modernism is misleading in two principal respects: first, because such writers do not necessarily see themselves as heralds of a new age chronologically distinct from, or superior to, the modern era; and second, because they do not propose a coherent doctrine which can be encompassed by a single term, but rather put forward a range of disparate but interlinked positions (LITVIN, KEEP, 2005, 91).

Even in the studies of such controversial issue as Stalinist terror and repression the legal framework is missing or very fragment⁶. The detailed analysis of Soviet law in the West started only in the 1950s, boosted in the 1960s and 1970s, but with the collapse of USSR academic community of Soviet law experts is decreasing rapidly. However, the investigations in this area should continue as without understanding Soviet legal past it is impossible to grasp the legal reality in nowadays Russia and former communist states and to predict their nearest future too. Moreover, the lack of legal expertise on USSR history causes danger that Soviet legal system would not get legal evaluation as Nazi legal system did during the Nuremberg trials and in German legal scholarship (Stolleis, 1998; Steubweis, Rachlin, 2014).

A decade ago some historians expressed concerns about the lack of professional juridical assessments of Stalinist repressions, which, by later international standards at any rate, were massive crimes against humanity (Litvin, Keep, 2005, 91). Another decade passed, but no progress was reached – evaluation of Soviet legal system is still left to not so well informed officials. The latest instance of this crucial gap is the recent judgement of the Grand Chamber of European Court of Human Rights in the case *Vasiliauskas v. Lithuania*, where former Soviet official accused of the genocide of Lithuanian partisans was acquitted, despite the well known fact of massive and cruel repressions against them. Even the help of well known Canadian academic in the field of international criminal and human rights law William Anthony Schabas (b. 1950) was insufficient to convince Grand Chamber to admit that the large scale partisan movement in Lithuania was suppressed using the tools identical to perform a genocide. The legal controversy in this topic is well illustrated by the joint dissenting opinion of the judges from Lithuania, Liechtenstein, Ireland, Portugal, which was followed by dissenting opinions from Latvian, Montenegrin, Hungarian and Croatian judges⁷. This suggests that the investigations of Soviet legal system from historical, sociological, political and other approaches are welcome as they bring new important perspectives to the area, but the final evaluation from the legal perspective belongs to legal historians (or other legal scholars) who have the ability to express themselves precisely in legal terms.

⁶ Among the historians who wrote on the Soviet terror or show trials during Stalin's rule (1929-1953) Robert Conquest (Stanford, USA), Sheila Fitzpatrick (Sydney, Australia), Wladislaw Hedeler (Berlin, Germany), Michael Ellman (Amsterdam, Netherlands), Jörg Baberowski (Berlin, Germany), John A. Getty (Riverside, USA) can be mentioned.

⁷ *Vasiliauskas v. Lithuania* [GC], No. 35343/05, ECHR 2015. Similar problematic was explored in the case *Kononov v. Latvia* [GC], No. 36376/04, ECHR 2010.

Investigations of Soviet law in the West before WWII

A statute-book is a people's bible of freedom.

Karl Marx

Before WWII very few Western scholars were interested in Soviet law and most of them were located in Europe⁸. Soon after the WWI Germany established a institute for the in-depth study of the new regime in Russia (Shimkin, 1965, 2). Elsewhere research was a bit more sporadic but quite considerable amount of writings was produced in French and Italian during interwar. The output of research was equally modest in England for this period. Research in other English-language countries was much more limited (Kavass, 1988, 4). In the United States the first notable works were published only in the 1930s after the diplomatic recognition of USSR in 1933. Prior to WWII American academic community produced only few books and about twenty articles on the issue (Hazard, 1945).

The investigations of Soviet law in the West were delayed due to the general scepticism for the emerging anti-capitalist state, the lack of relevant primary materials, constant reports on terror and the language barrier. Also it was not clear what role law will be given in the new socialist regime. Well known theory of “law withering away” was developed in the 1920s by leading Soviet jurists Latvian born Pyotr Ivanovich Stuchka (1865-1932) and Lithuanian background scholar Evgeny Bronislavovich Pashukanis (1891-1937) (Borrero, 2009, 266). Their main idea was that law itself eventually will disappear and the only question was the time when the disappearance of law is to begin. However, because of the pragmatic reasons Soviet regime had to create some “temporary” legal system, which was launched in the beginning of the 1920s by introducing new Soviet law codes, but the theory of law withering away prevailed up to the early 1930s, when the party politics changed towards strengthening Soviet legal system in order to rule more effectively.

As the studies of Soviet law had little perspective the first Soviet law experts in the West were not lawyers and they often demonstrated sympathy to the “new type of law.” Mary Stevenson Callcott (1894-1988) whose main scientific interest was on controversial social-legal issues, such as child labor legislation, was the first among Americans to publish a book about Russian criminal justice (Callcott, 1935). She was convinced that “Soviet system deserves to attract the attention of those genuinely interested in a better approach to effective crime repression.” (p. 238). In Europe, where increasing dissatisfaction with liberal democracy also encouraged academics to look for the alternative models of social order, British political theorist Harold Joseph Laski (1893-1950) presented a pamphlet *Law and Justice in Soviet Russia* (1935) and British barrister and Labor Party politician Denis Nowell Pritt (1887-1972) prepared a contribution about Russian legal system (Pritt, 1933). Laski, Britain's most influential intellectual spokesman for Socialism in the interwar years, emphasized that “Soviet legal sys-

⁸ The bibliography on Soviet law in English, French and German till 1943 is covered by HAZARD and STERN (1945) and in English till 1966 – by BUTLER (1966).

tem is strong in the very directions in which the English system has shown itself to be weak: in Soviet Russia the law has established vital contacts with every-day life, it is imbued with a strong sense of social responsibility, it is flexible and open to reform, and research is given a place of high importance.” Pritt was another defender of Soviet law in the British literature.

Scholars with legal background were not so enthusiastic and expressed either critical or neutral positions. Skeptical voices were mostly heard from Russian emigrant lawyers. Former tsarist judge Vladimir Gsovski (1891-1961) who left Russia in 1920 after having fought in the anti-communist army was educated both in Russian and Western universities and presented very negative attitude towards the “novelties” of Soviet civil and criminal law, which fit in the frames of “tradicionalist” trend developed in general Soviet history. In his opinion, Soviet law had no philosophical background in the Marxist theory, no matter, how hard Soviet scholars unsuccessfully tried to find it, because Marx and Engels discussed their ideas more in economical and social, rather than in legal terms (Gsovski, 1938, 31). For this reason Soviet regime after some time of the abolition of tsarist legal system in 1917 had to restore main attributes of traditional law system, i.e. the system of party controlled courts, procuracy and bar, the distorted principle of the independence of judges, etc. The conclusion of his observations was that “No longer desiring to create their own set of technical legal devices, Soviet jurists are content to accept the traditional (...) Law is still viewed primarily as an instrument of rulership, and not the guardian of rights. The very soul of law is thereby negated” (Gsovski, 1938, 42).

Dispassionate view, which is similar to revisionist stream in general Soviet history was shared between some Russian emigrants and American born scholars. Tsarist lawyer Judah Zelitch’s (1892-1973) pioneer book on Soviet criminal law was received with enthusiasm and ranked highly for introducing new Soviet criminal codes and for collecting material in Russia, but it lacked discussion about the influence of security authorities in the criminal cases and should be considered as careful examination (Zelitch, 1931). John Newbold Hazard (1909-1995), who later became the famous American Soviet law expert, after his studies at the Institute of Law in Moscow (1934-1937) also avoided overgeneralization and stucked to more objective (revisionistic) approach (Hazard, 1936, Hazard, 1938, Hazard, 1939).

Soviet law studies during Cold War

Centers

During the postwar United States actively encouraged research on every aspect of USSR operations in order to predict its immediate policy choices and decisions, therefore Soviet studies in the 1950s and 1960s were the beneficiary of unprecedented interest, expansion, and financial support (Butler, 2009, 157). Although the first academic center on interdisciplinary study of Russia and USSR despite of the rising McCarthyism was founded at Columbia University

(New York) in 1946, which is now known as Harriman Institute, the major catalyst spurring Soviet legal research and academic publications was the establishment of the Mid-European Law Project at the Law Library of Congress in 1949. This project was discontinued in 1960 and absorbed into the European Law Division of the Law Library (Sipkov, 1983, 586-588). Other American academic institutions also organized activities in the field of legal systems of the European states ruled by communists. The majority of researches were conducted by individuals at different universities, distant from one another and without any organized structure of collaborative work⁹. The research work continued there despite the fact that the generous government support has been severely cut back in the 1970s.

In Europe the Council of Europe's initiative with the section called European Committee on Legal Cooperation to supervise an international, administrative, civil, and commercial law agenda, was founded in May of 1949. However, due to the low financial support, political interest and poor infrastructure in postwar Europe the first academic center of Soviet legal scholarship in English started its activity only in 1953, when Hungarian origin Law Professor at Leiden University (Netherlands) Zsolt Szirmai (1903-1973) created a special department, which after five years began a irregular series of publications with the focus on Soviet law called *Law in Eastern Europe* (Barry, Feldbrugge, Lasok, 1975). Till 2015 the number of volumes reached impressive 65. Soon many European universities launched divisions on Soviet/Russian/Eastern social issues, but only Leiden University was reputed to have most comprehensive collections of rare and generally inaccessible documents and its staff was widely recognized. The Federal Republic of Germany also continued to support its institutes for Soviet law and continued to produce publications primarily in German. Regular teaching of Soviet law had been established at Free University of Berlin and at the universities in Gottingen, Hamburg, Kiel, and Munich (Shimkin, 1965, 32).

Scholars

During the Cold War senior American legal scholars were joined by new names: George Ginsburgs (b. 1932), Professor of Law at State University of New Jersey, Donald DeLyle Barry (b. 1934), Professor of Political Science at Lehigh University (Pennsylvania) and Gordon B. Smith – Professor of Political Science at University of South Carolina. One of the world's best-known scholars of Soviet law former U. S. Army cryptographer in Europe (1942-1945) Harold Joseph Berman (1918-2007) was mentored by Hazard during his studies at Harvard Law School. In the next decades they both tutored Peter Maggs (b. 1936) who became Professor of Law at the University of Illinois, also John Quigley (b. 1940), Professor of Law at Ohio State University, and William Elliott Butler (b. 1939) – Professor of Law at Pennsylvania

⁹ An incomplete inventory of schools and teachers follows: California (J. Towster, J. A. Cohen), Columbiina (Hazard, O. J. Lissitzyn), Connecticut (E. Margolis), Washington (B. Ramundo), Harvard (H. J. Berman), Illinois (P. Maggs), Indiana (D. P. Hammer), Iowa (G. Ginsburgs), Kansas (O. Backus), Michigan (W. Gray), New York (I. Shapiro), Stanford (J. Triska), Wisconsin (Z. Zile), Yale (L. Lipson) (SHIMKIN, 1965, 30).

State University. The group of Eastern European origin scholars in USA was smaller and had less opportunities to expand. Zelitch and Gsovski were joined by famous tsarist legal sociologist Nicholas Sergeyevitch Timasheff (1886-1970) who became a Professor of Sociology at Fordham University (New York), former Imperial Russia legal scholar George Constantine Guins (1887-1971) who took a position at the University of California (Berkeley) and Jewish background lawyer Konstantin Mikhailovich Simis (1919-2006) who represented political dissidents in Moscow and emigrated from USSR in 1977. They were strongly supported by Polish lawyers Kazimierz Grzybowski (1907-1993), Adam Podgórecki (1925-1998) and Latvian Zigurds L. Zile (1927-2002). The last in this group was Ukrainian origin Professor at Leningrad (now St. Petersburg) University Olympiad Solomonovich Ioffe (1920-2005) who left USSR in 1981 and continued his work in the University of Connecticut.

The best arena for European legal scholars who preferred to share their knowledge on Soviet law in English was the series of *Law in Eastern Europe*. Among the most active contributors British Albert Kenneth Roland Kiralfy (1915-2001) and Estonian origin Henn-Jüri Uibopuu (1929-2012) can be mentioned. Kiralfy, Professor of Law at Kings College in London, after living in USSR as exchange scholar in the Leningrad Law School (1961-1962) demonstrated his interest in Soviet inheritance law (Kiralfy, 1961) and translated Soviet civil codes (Kiralfy, 1966). Meanwhile, Uibopuu who worked at Salzburg University (Austria) was interested in Soviet administrative procedures (Barry, Ginsburgs, Maggs, Feldbrugge, 1979, 25-31) and international law (Feldbrugge, 1986, 467-483)¹⁰. However, most widely known Soviet law expert in Western Europe during the postwar was Ferdinand Joseph Maria Feldbrugge (b. 1933) – former officer of Dutch army and a Professor of Law at Leiden University (Barry, Ginsburgs, Simons, 1996, xiii). His academic career began in 1959 with the dissertation on Soviet criminal law and with the major work on the general part of Soviet criminal law (Feldbrugge, 1964). Later he took a scholarly effort to compile an encyclopedia of Soviet law (Feldbrugge, 1973). During “perestroika” Feldbrugge focused on the changes in Soviet/Russian law (Feldbrugge, 1987) and his latest work is devoted to the old history of Russian law (Feldbrugge, 2009). After he was appointed as Professor in 1973 the periodical *Review of Socialist Law* came into being in 1975, which changed the name to *Review of Central and East European Law* in 1991. New journal strengthened the studies of Soviet law and the reputation of Leiden University as the center of the topic in the English speaking world. Feldbrugge was followed by William Bradford Simons (b. 1949) who started his career in Leiden and currently is Visiting Professor at University of Tartu (Estonia). Over a span of more than three decades Simons has been active in the area of Russian, East European and comparative law (Simons, 1974, 1980, 2001, 2002, etc.).

¹⁰ Other Baltic origin scholars active in the series: Latvian Egil Levits – research fellow in the University of Kiel who prepared a valuable contribution on the development of legal relations between the Communist party of Latvia and the Communist party in the USSR (FELDBRUGGE, 1986, 57-75) and Professor of Law in Kiel University Dietrich Andre Loeber (1923-2004) who was born in Riga in senator August Loeber’s family and emigrated to Germany in 1939 (BARRY, FELDBRUGGE, 1988).

Topics

After the WWII the body of literature about Soviet legal system was growing rapidly and its topics varied throughout the decades. The early contributions demystified Soviet law and permitted to read it with the same institutional scale as other twentieth century legal systems. During the 1950s American scholars focused on Soviet civil law (Gsovski, 1948, 1949), philosophical and historical origin of Soviet law (Berman, 1950; Guins, 1954), relations between law and society (Hazard, 1950, 1953), judiciary (Gsovski, Grzybowski, 1959) and legal reform after Stalin's death (Hazard, 1955, 1957, 1959; Berman, 1956, 1957; Grzybowski, 1960, 1962).

During the long "stagnation period" (roughly 1964-1985) when little real development occurred in the province of Soviet law Western scholarship was consolidated and the themes have tended to overlap. Hazard in *Settling Disputes in Soviet Society* (1960) presented a detailed account of the evolution of judicial structures and practices in Russia from 1917 to 1925 and revealed the rejection of many pre-revolutionary and Western concepts, then their eventual reincorporation into the "new" Soviet law. Another book *The Soviet Legal System* (1962) was a collection of post-Stalin Soviet legal materials: case decisions, statutes and doctrinal commentary, which was enlarged and republished twice (Hazard, Shapiro, Maggs, 1969; Hazard, Butler, Maggs, 1977). Later he also presented the practice of Soviet law across the entire range of its functions – from the drafting of constitutions and the enforcement of economic policy to the suppression of religion and the control of family life (Hazard, 1983). Meanwhile, Berman together with Quigley prepared a collection of basic Soviet legislation and the political structure of the Soviet state, especially in its legislative, administrative, and judicial aspects (Berman, Quigley, 1969) and Butler reviewed Russian legal history from the earliest times one more time (Butler, 1983).

Several new topics in the field were presented by young specialists who were looking for original perspectives in investigating Soviet law. Maggs together with Berman presented a study on disarmament verification under Soviet law (Berman, Maggs, 1967) and Quigley turned his attention to merchant shipping and foreign trade in USSR (Quigley, 1970, 1974). Butler's early research pursued the interface between Soviet law and the international legal system, a subject which he later broadened to address comparative approaches to international law (Butler, 1971, 1973, 1976, 1977, 1978). New important topic of the relations between Soviet economics and Soviet law was introduced by Maggs, Ginsburgs and Smith (Maggs, Smith, Ginsburgs, 1981, 1982). Both works presented the endemic defects of the Soviet economic, political and legal system, which had a great impact to the struggle of the country to adjust its laws to meet the needs of technical revolution. During the Gorbachev era (1985-1991) when legal environment was changing too fast to be properly investigated some American scholars drawn their attention to the life and heritage of the most famous Soviet jurists: Pashukanis, Stuchka, Krylenko (Maggs, 1980; Maggs, 1988; Barry, 1989, 131-147; Beirne, 1990).

Due to the lack of interest and finance English literature on Soviet law in Europe during the Cold War was considerably less voluminous than in the United States and mainly produced in Leiden. The first volumes of *Law in Eastern Europe* in the 1960s were more of intro-

ductory nature and focused on general Soviet legislation in criminal, civil, inheritance, insurance, copyright and other legal areas. In the next decade a strong cooperation with American scholars was developed: Barry, Maggs and Ginsburgs together with Feldbrugge presented their major work *Soviet Law After Stalin*, which can be referred to as the generalization of twenty years of Soviet law studies in the West (Barry, Ginsburgs, Maggs, 1977, 1978, 1979). They were followed by volumes devoted to Soviet procuracy, new Soviet codes, and an enlarged encyclopedia of Soviet law (Boim, Morgan, 1978; Simons, 1980; Feldbrugge, 1985). In the 1980s the researches in Leiden became more complex with the goal to evaluate the Soviet legal system and its perspectives (Feldbrugge, 1982, 1987; Van Den Berg, 1985; Ginsburgs, et al., 1989).

The Clashes of the Titans

The polarization between Western scholars' views towards the Soviet legal system occurred in the mid-1950s. Soviet legal scholarship divided into two camps: traditionalists ("terrorists") were represented by critical scholars who did not compartmentalize law and force facilitates, and revisionists ("legalists") were advocated by scholars with a neutral or mixed approach (Zile, 1970, 216).

"Legalists" frustrated by limited access to Soviet documentation sought objective information and concentrated on representing Soviet law in the books, which led to the accusations of being too naïve and perception of them as being pro-Soviet (Kavass, 1988, 7). The leader of the legalist camp was Berman, who took a revisionist course and interpreted Soviet law through analytical, historical and philosophical screens. His most famous *Justice in Russia* (1950) challenged the orthodox (traditionalist) models of Stalinist Russia and emphasized that, despite the pervasive terror, law was not absent or incidental in the USSR. Berman viewed Soviet law as the product of complicated processes, which had their roots in two thousand years of European history. He distinguished three components of Soviet law, the first being the "socialist component," which was characterized by an attempt to find legal solutions for problems created by the nationalization of production and the collectivization of agriculture, the second was the "Russian legal tradition" component, representing inherited traditions and peculiar national traits which have become embodied in Soviet law and the third component was termed by "parental factor" which during the Cold War era was found to be one of the most controversial aspects. In Berman's opinion, Soviet law had an "educative" function, therefore the judge was not to be considered as an oracle of the law who, by virtue of his office, stands above and isolated from his fellow-citizens – the duty of the judge was to guide and teach them¹¹. Berman's attitude towards Soviet law was mixed: on the one hand, he interpreted Soviet law without prejudice or antipathy, on the other hand, complimentary

¹¹ The view that the parental qualities of law in the former Soviet Bloc correspond well not only with the needs of unsettled and impoverished populations in Eastern Europe, but with the modern welfare state in general is prevailing now (MARKOVITS, 2007, 233-253). Ernst Fraenkel has described another totalitarian "Dual State" – Hitler's Germany – in which law and terror (or, in Fraenkel's terms, the "normative" and the "prerogative" state) complemented each other (FRAENKEL, 1941).

remarks were sprinkled through the book, in particular, Berman's description of the Soviet criminal procedure, but his opinion on Soviet terrorism and "excessive regimentation" was undoubtedly critical. *Justice in Russia* was republished in 1963 in a revised and enlarged edition as *Justice in the USSR*, while retaining its original structure and became the prelude to Berman's later monumental studies on the history of Western legal tradition (Berman, 1963; Berman, 1983; Berman, 2004).

The "law in reality" school, which was mostly promoted by experienced Russian emigrants was often criticized as anti-Soviet. In his mammoth work, which presented a combination of the historical and systematic approach on Soviet civil law Gsovski had no illusions about its negative origin (Gsovski, 1948, 1949). Guins in *Soviet Law and Soviet Society* (1954) shared Gsovski's sceptical view and was concerned with the increasing centralization of authority with progressive reduction in individual freedom. Timasheff who was a contributor of the series of *Law in Eastern Europe* discussing the regulation concerning procuracy (1955) also doubted that the new law will put an end to an endemic situation created by the one party dictatorship (Szirmai, 1958, 8-26).

Hazard mainly continued in the spirit of dispassionate approach and criticized some authors for too negative approach, i.e. he called Guins's *Soviet Law and Soviet Society* (1954) "somewhat oversimplified effort to win friends for our side in the Cold War" (Hazard, 1955, 542). Yet, in *Soviet Legal System* (1962) he took a sceptic note on Soviet criminal law himself stating that Soviet penology was "rather underdeveloped". Hazard attributed this "failure fully to come to grips with the sociology of crime" and the fluctuation of Soviet criminal law "between increase and relaxation of severity" (Hazard, Shapiro, 1962, 134).

The debate grew stronger in the 1960s, when the common believe that Soviet Union after one person terrorism is getting a shape of "normal" state increased. Berman reflecting on the post-Stalin developments til 1963 saw seven major tendencies in Soviet law reform extending over the previous decade, such as the elimination of political terror, the liberalization both of procedures and of substantive norms (Berman, 1963, 66-96). Western historians also were optimistic about the improvement of political climate in Soviet Union (Conquest, 1968; Wortman, 1976; Tucker, 1977). But Gsovski in his significant work *Government, Law, and Courts in the Soviet Union and Eastern Europe* (1959) argued that Soviet courts were not impartial, Soviet judges were not trained in law, Soviet criminal procedure lacked any element of fairness to the accused, Soviet lawyers were merely agents of the State, the Soviet secret and regular police dominated the legal system, Soviet officialdom was characterized by extreme formalism, Soviet criminal penalties were very harsh, Soviet citizens had only the most limited rights of ownership, Soviet workers received only the most limited protection by law, etc.¹² In Berman's opinion, the parts of the book written by Gsovski (about 420 pages) "contain so many factual errors and misinterpretations that the non-specialist must approach the entire work

¹² It was a product of the collective work of 29 lawyers who received their legal education and practiced law in their native countries and dealt with the law of the Soviet Union, including the three Baltic Republics occupied in 1940, and the seven countries of Eastern Europe known as People's Democracies.

with the greatest scepticism and caution” (Berman, 1961, 303). Unable to discuss all “distortions” adequately within the confines of the review, he offered to send a copy of a separate thirty-seven page list to any reader on request. However, this represented a clash of attitudes toward Soviet law rather than obvious errors by either writer. For instance, Gsovski was sure that secret police could intervene in any court proceeding and have unlimited power to do so as the preliminary investigation of political crimes was not regulated and Berman argued that the preliminary investigation of political crimes was governed by the Code of Criminal Procedure, except that arrest was subject to special unpublished regulations and preliminary investigation by secret service was regulated by the Statute on Procuratorial Supervision in the USSR (1955) (Berman, 1961, 304).

Gsovski’s views were supported by other European scholars. Grzybowski in *Soviet Legal Institutions* (1962) was concerned with the fluctuations in Soviet criminal law and stated that “constant changes of policy jeopardize the prospects for re-educating the Soviet man. This is because the institutions of Soviet life appear as relative values and not as constants, raising no doubts in the minds of the majority” (Grzybowski, 1962, 215). Dutch criminal law professor at Leiden University Jacob Maarten van Bemmelen (1898-1982) who contributed to the series of *Law in Eastern Europe* also could not refrain himself from being sceptical about the list of safeguards for the liberty of the citizen guaranteed by the new law – Basic Principles of Criminal Legislation and Basic Principles of Criminal Procedure of 1958 (Feldbrugge, 1959). Professor of law at Hebrew university in Jerusalem Leon Boim (1896-1972) was sceptical about the ability of excessive party control and supervision to rise the moral standards of public servants and to prevent them from perpetrating frauds and accruing dishonest gains too (Boim, Morgan, Rudzinski, 1966, 98-100).

In the 1970s the confrontation between two camps took somewhat different form: as the revisionist neutral attitude prevailed young scholars stayed away from moral evaluation of Soviet law (Quigley, Butler, Maggs, Barry, Ginsburgs, Feldbrugge) and were criticized for avoiding to evaluate Soviet law in principal. For instance, the major work of Maggs, Barry, Ginsburgs, and Feldbrugge *Soviet Law After Stalin* (1977-1979) was attacked “for evasion to assess the possibly emerging rule of law in USSR” (Vanneman, 1980, 837). However, Butler in his *Soviet Law* (1983) expressed personal expectations that with the emerging attention to the “socialist legality” Soviet law may develop into a subordination to law by the state itself and by social organizations, but these hopes were doomed by senior Russian emigrant lawyer Simis who in *The Corrupt Society* (1982) clarified the real role of law in Soviet society, pitting socialist reality against socialist legality, where all were infected with corruption and justice was for sale.

In the 1980s positive approach towards Soviet law was presented again by former Soviet scholar Ioffe who introduced an article, in which he argued that Soviet state pursued a consistent and successful policy of manipulating the legal structure and legal revolution of the economy to secure the regime’s political position (Ioffe, 1982, 1591-1625). He also cooperated with his former student Maggs and produced *Soviet Law in Theory and Practice* (1983), which concerned with Soviet economic and legal issues and was criticized by Berman

as “puzzling and frustrating,” because authors “describe a relatively stable and sophisticated legal order, which functions fairly efficiently and which also achieves a high degree (though not a high enough degree) of justice” (Berman, 1985, 72-73). Zile was even not sure whether the idea of cooperation was wise, as “in appearance and in detail of execution, the book is no compliment to anyone” (Zile, 1985, 349). Nevertheless, Maggs and Ioffe soon prepared another work *Soviet Economic System: A Legal Analysis* (1987) where they contended that too many Western sovietologists concentrated on purely economic matters, and, as a result, “often make mistakes inexcusable in light of facts that are readily available” (Maggs, Ioffe, 1987, 1). They concluded that with some modification the basic purpose of the economic legal regime in the Soviet Union was the same as it is elsewhere – “To deter conduct that threatens the system and to provide compensation for damage caused to the system. Legal protection is more necessary and more extensive in the Soviet system than in a capitalist system, because the very nature of the Soviet system creates more temptations and more possibilities for abusive conduct, and, moreover, because such conduct is not only economically but also politically dangerous for the Soviet system” (Maggs, Ioffe, 1987, 269). Similar ideas were also expressed in Ioffe’s *Soviet Law and Economy* published by the series of *Law in Eastern Europe* (Ioffe, Janis, 1987).

The long lasting clash between experts on Soviet law demonstrates the difficulties which arise trying to understand the legal reality in which one does not live. Western origin scholars were over-emphasized with the law in books and tried to demonstrate their impartiality in the context of Cold War. Most of them were influenced by comparative approach of law and relied on the analysis of selected Soviet statutory texts or summarize portions of standard books, compared them with the legal constructions in the West and finally tended to find what they wanted to find (Zile, 1970, 215-216). Authors with Eastern European background did not trust comparative method so much and argued that Soviet legal system must be presented in the light of the main peculiarities of the whole political system. Guins defending *Soviet Law and Soviet Society* (1954) stated that “The knowledge of socialist doctrine and acquaintance with the final goals of communism, its specific ethics and attitude toward individual interests and moral values, are thus most important for understanding the essential peculiarities of Soviet law as an instrument of policy” (Guins, 1957, 67).

The lesson from postwar experience for Soviet law experts in the XXI century is clear: to avoid conclusions on Soviet law based on one’s way of thinking rather than the real facts. But, again, scholars’ isolation from personal and intellectual background is impossible. As Zile put it, “The skills, the temperament and the intellectual tradition of the scholar has, and will continue to set his research objectives” (Zile, 1970, 206). The dispassionate approach in Soviet legal scholarship promoted by Hazard is probably the best solution at the moment, however, one has to be very careful as neutral historical examination of Soviet law could lead to dangerous minimizing of what happened.

Soviet legal history after the collapse of Soviet Union

The wild 1990s

From the moment USSR was abolished all Soviet law experts faced drastic changes. They had two main possibilities: either to focus on the emerging new legal system in Russia or to continue with the investigations of Soviet legal history in the newly opened Russian archives. The first opportunity was very unexpected for Soviet law specialists as they were able to take part in legal restructuring through involvement in law reform, through the practice of law, and through participation in Russian legal education and retraining, therefore the majority of scholars took this chance. As the result, legal scholars in the 1990s started to lose the monopoly of investigating Soviet law, which was transmitted to the orbit of historical, sociological and political researches.

Paul B. Stephan (b. 1950), Law Professor at University of Virginia, is worth to be mentioned among the first American legal scholars who adapted his experience in Soviet law successfully focusing on changing property relations in USSR (Stephan, 1990, 1991, 1992, 1994, 1997). Maggs translated Civil Code of Russian Federation (Maggs, Zhiltsov, 1997) and prepared a collection of documents about Stalin-era prison and labor camp records (Maggs, 1996), while Smith examined how traditional indigenous Russian legal values and the experience with communism and “socialist legality” were combined with Western concepts of justice (Smith, 1996). Alongside Barry edited a volume about the possible rule of law in Russia and supplied detailed analysis of recent developments in the areas of civil, criminal, and labour law and the rights of individuals, economic organizations, political and social groups (Barry, 1992) and prepared a book, which covered the various most famous political cases in Soviet era (Barry, Feofanov, 1996). The series of *Law in Eastern Europe*, which remained the center of Soviet and post-Soviet legal studies in Europe also concentrated on the legal changes in former USSR and discussed the emancipation of Soviet law (Feldbrugge, 1992), the revival of private law (Ginsburgs, 1996), and the increasing role of law in Russia (Schmidt, 1990; Feldbrugge, 1993). Ginsburgs together with Feldbrugge was one of the most active authors at that time as he prepared two volumes on war crimes tribunals (Ginsburgs, Kudriavtsev, 1990; Ginsburgs, 1996) and a work on successor doctrines and practices of Soviet international law (Ginsburgs, 1998).

As Western legal scholars missed the opportunity to verify their interpretations of Soviet law in the Russian archives, scholars from other related fields stepped in. Students of history, (legal) sociology, political and other areas focused on Stalin era and their works reflected the general trend among Western and Russian researchers of Soviet history to reinvestigate the most terrible period – Stalinism. Using fashionable revisionist methodological approaches they were the first to present new perspectives of Soviet legal history. Peter H. Solomon (b. 1942), Professor of Political Science at University of Toronto (Canada) whose primary interest was on Soviet criminal policy continued to investigate criminal justice in USSR after Lenin rule and analyzed the input to Soviet legal system from below. In *Soviet Criminal Law*

under Stalin (1996) Solomon stated that justice and law have been overshadowed by the interests of party only at the beginning of the collectivization in the 1930s, but since 1938 legal and political activities were separate and independent. He argued that Soviet judges had real opportunities to perform justice, because judges often managed to soften the harsh sentences or use the judge's discretion to decide cases according to the rule of the "revolutionary consciousness." In his opinion, other writers have exaggerated the significance of the nihilist view in the post-1930s administration of Soviet justice¹³. Similar ideas were expressed by revisionist American historian Robert W. Thurston (b. 1949) who viewed the years of 1934-36 not as the beginning of a calculated progression toward mass arrests and show trials engineered by Stalin, but as a time when "progress was being made toward a fairer, more consistent, and less political application of the law. Unfortunately, this trend quickly broke down" (Thurston, 1996, 22). Important theoretical investigation on totalitarian law was offered by Polish origin legal sociologist Adam Podgórecki (1925-1998), Professor in Carlton University (Canada) who saw totalitarian law as the instrument of manipulator social engineering, which must be supported by political authorities in order to function. He concluded that in totalitarian states the law is developed and applied in a variety of ways but it unvaryingly becomes degraded and leads to the destruction of civic society (Podgorecki, Olgiati, 1996, 341-357). Meanwhile, Kathryn Hendley (b. 1958), Professor of Law and Political Science in University of Wisconsin, discussing the problem of making law matter again in Russia, argued that the institutionalization of the rule of law in Russia after 1991 has proven to be a difficult challenge as Leninist regime destroyed popular faith in law and legal institutions (Hendley, 1996).

XXI century

With the turn of the millennium American Soviet law experts continued with the orientation towards new Russian law and their interest to Soviet legal history was almost lost. Maggs introduced more translations (Maggs, 2002, 2003, 2008, 2010) and joined to prepare the third edition of the volume on law and legal system of the Russian Federation, which provided an introduction to the principal features of the law and legal institutions of present day Russia and some historical issues (Maggs, Burnham, Danilenko, 2004). Butler published *Russian Law*, which contained some chapters on Russian legal history and legal theory (Butler, 1999), but neither of these books were polemic – the basic goal was to provide information for Western law students and practitioners, especially for the future investors in the Russian Federation. However, Butler in his later collection of thirty-five years essays and reviews devoted to Russian legal history started a new discussion with the legal comparativist Patrick Glenn (1940-2014), whether a Soviet (socialist) legal system can be considered as new legal system (Butler, 2009, 170-176). Butler contradicted Glenn's propositions that Soviet law was an oxy-

¹³ His other works are listed in the bibliography (SOLOMON, 1978, 1983, 1996, 1997; SOLOMON, FOGLESONG, 2000, 2001).

moron – “a brutal, hypocritical and overweening exercise of political power” (Glenn, 2000, 330). In Butler’s opinion, Russian (Soviet) law has not been measured yet as a legal tradition in the sense in which Glenn uses that term, assuredly, not by Russian jurists and the moment is opportune to begin to do so, perhaps by starting where Glenn did not venture – an examination of what can be captured by Glenn’s comprehension of tradition, be that legal tradition or something more general (Butler, 2009, 175). The newest unconventional reappraisal of Soviet law was presented by American scholar Scott Newton – a law graduate of Berkeley and Harvard universities with current position in University of London, in which he argued that Soviet order was a work of law and analyzed the central significance of law in the design and operation of Soviet economic, political, and social institutions (Newton, 2015). In Europe the series of *Law in Eastern Europe* continued with the focus on constitutional law in post-Soviet bloc (Gönenç, 2002; Smith, Sharlet, 2008), human rights problems (Feldbrugge, 2002; Mälksoo, 2014), legal values (Feldbrugge, 2007; Simons, 2014), and other transitional issues (Feldbrugge, 2002; Waters, 2004; Kühn, 2011).

The rest was investigated by non-legal scholars who continued to pursue new approaches to Soviet law. With the loss of more objective senior legal scholars the negative interpretation of Soviet law from the Cold War era prevails in these new works and Soviet law is only a context, but not the object of the research anymore. Historian from St. Andrews University (Scotland) Frances Mary Nethercott, concentrating on the development of capital penalty, presented an innovative contribution about the development of legal thought in Russia since the mid-nineteenth century (Nethercott, 2007) and the scholars from Oxford University Galligan and Kurkchiyan presented new socio-legal approach towards Soviet law trying to explain why law is often powerless in the newly formed social order. They focused on the interplay between law and social norms, informal practices, and human values, concluding that Soviet law was only the instrument of power without inner integrity therefore law in USSR failed to meet its function – to ensure proper functioning of the society (Galligan, Kurkchiyan, 2003, 7-9). Professor of Politics at Manchester University Yoram Goralizki prepared work on the relationship between politicians and bureaucrats, and the role of interpersonal trust in political systems (Goralizki, 2004). At the moment he is involved in a major research project about Soviet justice system, which examines the emergence of the Soviet criminal justice system in the aftermath of WWII, taking the story through to the end of the Khrushchev era (*Taking Dictatorship Seriously: Justice and the Constitution in Soviet Russia*). The results of this project are unknown yet.

The newest social science literature left the “transition” fashion behind and started to form around the legacy arguments. Romanian origin political scientist at St. Francis Xavier University (Canada) Lavinia Stan examined three levels of de-communization: a) lustration as a means to temporary ban from public office former members of the party bureaucracy and secret police officers and informers, b) ordinary citizens access to their own files in secret police archives, c) trials and court proceedings launched against former communist dignitaries and secret police officers/agents charged with human right abuses (Stan, 2010). Meanwhile, Professor of Politics at Princeton University Mark R. Beissinger and historian from Princeton

University Stephen Kotkin asked what has been the long-term impact of communism on political, social, and economic development of the formerly communist states. They wanted to understand the legacies of communism to post-Soviet legal system and edited chapters on legacies in law enforcement institutions (secret and regular police, procuracy) also in criminal justice (near universal court approval of detention of the accused, avoidance of acquittals) (Beissinger, Kotkin, 2014, 128-179).

The nearest future will reveal, whether the scholars from post-communist bloc are willing to participate in the further development of Soviet legal history and which interpretation they will choose for their investigations. The researches with dispassionate (neutral) approach towards Soviet law could serve for these countries best in facing totalitarian legal past, accepting it and moving forward.

Conclusion

Despite the fact that Soviet legal history was never so popular among Western scholars as general Soviet history was, different interpretations of Soviet law (negative, positive, and neutral), which in principal reflects historical views towards Soviet reality from “totalitarian,” to revisionist and post-revisionist, were formed in English speaking literature in the last century. The history of studying Soviet law in the West divided into three main stages (interwar, Cold War and the period after the demolition of USSR) presents various political, social and personal factors, which influenced the establishment of diverse interpretations of Soviet law in Western scholarship. Soviet legal studies reached the peak during the Cold War and after the collapse of USSR the interest in this field decreased greatly, however, the investigations should not be abandoned by legal scholars as it could serve to understand the legal reality in post-Soviet societies and to predict their nearest future too.

During the interwar period Soviet legal studies lacked academic interest and were carried by non-lawyers and few legal scholars. Among the first group of experts the positive attitude towards Soviet law prevailed (Callcot, Laski, Pritt), while in the second more sceptic and neutral voices were heard (Gsvoski, Zelitch, Hazard). In the years of the Cold War Soviet legal studies enjoyed great popularity and financial support, especially in the United States, but it also had to face the competition between two camps: critical “terrorists”, the majority of whom had Eastern European background and knew Soviet political system from the inside (Gsvoski, Guins, Timashef, Grzybowski, Podgórecki, Simis), and the dispassioned “legalists”, represented by Westerners who were over-emphasized with the Soviet law in books and the comparative method of investigating Soviet law (Hazard, Berman, Butler, Barry, Ginsburgs, Feldbrugge, etc.).

After the collapse of USSR the majority of Soviet law experts started to focus on the emerging new legal system in Russia and Soviet law was transmitted to the orbit of historical, sociological and political researches. Non-legal scholars developed new fashionable revisionist

methodological approaches and Soviet law became only the context of the researches. In result, the negative view towards Soviet law, which was uncritically borrowed from the Cold War era prevails in these works. However, dispassionate (neutral) approach in Soviet legal history is probably better choice for the future Soviet law experts.

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